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THE KOREA FAIR TRADE COMMISSION'S DECISION ON MICROSOFT'S TYING PRACTICE: THE SECOND- BEST REMEDY FOR HARMED COMPETITORS

Sejin Kim[†]

Abstract: In the spring of 2006, the Korea Fair Trade Commission ("KFTC") imposed a fine of approximately thirty-one million dollars and a cease-and-desist order against Microsoft Corporation ("Microsoft") for bundling its Windows Media Service ("WMS"), Windows Media Player ("WMP"), and Windows Messenger ("WM") into its personal computer operating system "Windows." Specifically, the KFTC ordered Microsoft to completely separate WMS from Windows and provide two different versions of Windows: one bundled with WMP and WM and the other without these two programs. It is also noteworthy that the KFTC required Microsoft to include the "Media/Messenger Centre" in the bundled version to help users download competing media players and instant messengers.

Yet, the KFTC's requirement still seems imperfect because most end-users become wedded to Microsoft's application programs to which they are exposed first. Instead, the KFTC could have imposed a "must-carry" obligation which requires installation of other competing media players and messaging programs as the default in Windows. Among various remedial options available, the must-carry requirement against Microsoft could be the most effective way to give Windows users fully equal access to competing products. But many practical difficulties, such as increased costs due to potential legal and economic problems exist in providing such equal accessibility through the must-carry option. Thus, the KFTC's "Media/Messenger Center" requirement, which is expected to create similar (but still not equal) accessibility as the must-carry obligation, was an appropriate alternative as the next best option for the KFTC.

I. INTRODUCTION

The Microsoft Corporation ("Microsoft"), one of the biggest software companies in the world, is recognized as the "Great White Whale" of antitrust across the world, particularly in the U.S. and Europe.¹ Unfortunately, it could not stay away from the spear thrown by the Korean government's antitrust watchdog, the Korea Fair Trade Commission ("KFTC"). On December 7, 2005, the KFTC reached a decision which ordered both Microsoft and Microsoft Korea² to unbundle their tied products, including Windows Media Player ("WMP"), from Windows operating system ("Windows"), and imposed a fine of approximately thirty-

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¹ Randal C. Picker, *Unbundling Scope-of-Permission Goods: When Should We Invest in Reducing Entry Barriers?*, 72 U. CHI. L. REV. 189, 197 (2005).

² The Korean branch of Microsoft Corporation.

three billion won (equivalent to approximately thirty-one million U.S. dollars) for the violation of the Monopoly Regulation and Fair Trade Act (“MRFTA”).³ Microsoft appealed this decision, but the KFTC dismissed it without merit on June 6, 2006.⁴ Similarly, the European Commission (“E.C.”) held that Microsoft violated the E.C. treaty by bundling WMP to Windows.⁵ The KFTC’s decision is regarded as more stringent than that of the E.C. because of the types of corrective measures imposed.⁶

The purpose of this Comment is to provide an in-depth inquiry into the effectiveness of the KFTC’s corrective measures to remedy harms caused to competitors by Microsoft’s illegal tying practices. Section II of this comment introduces Korean antitrust laws and the functions of the KFTC. Section III summarizes the structure of the KFTC’s decision and application of antitrust laws. Section IV examines the effectiveness of the remedies adopted by the E.C. and the U.S. that the KFTC considered in forming its own remedial measures. Section V evaluates the KFTC’s current remedies by examining and comparing several options that the KFTC could have adopted.

This comment will cross-reference pertinent sections of the KFTC’s decision translated into English by this author.

II. THE MRFTA IS KOREA’S CORE ANTITRUST REGULATION

The MRFTA⁷ is Korea’s core legislation designed exclusively to govern competition law and policy.⁸ The MRFTA has fourteen chapters, seventy-one articles and some addenda. The Act encompasses every

³ 마이크로소프트 코퍼레이션 및 한국마이크로소프트 유한회사의 시장지배적 지위남용행위 등에 대한 건 [*In the Matter of the Abuse of Market Dominant Position of Microsoft Corporation and Microsoft Korea*], (2002 경축 0453, 2005 경축 0375) [2002 Kyung-Chok 0453, 2005 Kyung-Chok 0375], Korean Fair Trade Commission (2006) (S.Korea), available at http://ftc.go.kr/data/hwp/case/20060217_9653.hwp [hereinafter Microsoft Decision]. In this article, I first provide an analysis of the relevant legal and historical context of this case, followed by my translation of the decision. Here, I only translated the “holding” section of the decision. The whole decision is 266 pages long in the original language, 16 pages of which were dedicated to the holding.

⁴ 마이크로소프트 코퍼레이션 및 한국 마이크로소프트 유한회사의 이의신청에 대한 건 [*In the Matter of the Appeal from Microsoft Corporation and Microsoft Korea*], 2006 심이 1163 [Case No. 2006 Sim-Yi 1163] (2006) (S.Korea), available at http://ftc.go.kr/data/hwp/case/20060529181129449_.hwp).

⁵ Case COMP/C-3/37.792 Microsoft, Commission Decision of March 24, 2004, available at <http://europa.eu.int/comm/competition/antitrust/cases/decisions/37792/en.pdf> [hereinafter Commission Decision].

⁶ Youngjin Jung & Seung-Wha Chang, *Korea’s Competition Law and Policies in Perspective*, 26 NW. J. INT’L L. & BUS. 687, 696 (2006).

⁷ 독점규제 및 공정거래에 관한 법률 [Monopoly Regulation and Fair Trade Act], Statutes of South Korea, Act No. 7796, (1961) (last amended on Dec. 29, 2005) (S. Korea).

⁸ Jung & Chang, *supra* note 6, at 696.

traditional subject of competition law, including anti-competitive mergers, cartels, monopolizations, resale price maintenances, and exclusive dealing arrangements.⁹

The MRFTA is primarily enforced by government agencies, especially the KFTC which functions as a quasi-judicial body operating under the executive authority of the Prime Minister.¹⁰ The KFTC consists of a committee of nine commissioners (the decision-making body) and a secretariat (a working body).¹¹

The KFTC's case proceedings are composed of two stages: examination and deliberation.¹² The examination stage begins when a competition law violation is reported.¹³ The KFTC begins the examination process by investigating relevant documents, consulting with experts, conducting legal reviews, and so forth.¹⁴ If the examiner concludes that legal measures are necessary, the KFTC's commissioners begin review of the reports, opinions, and other documents submitted by the examinees.¹⁵ The examinees may express their opinions directly or indirectly through their respective legal counsels throughout the deliberation processes.¹⁶ If a violation is duly recognized by the commissioners, the KFTC imposes corrective measures such as cease-and-desist orders and fines.¹⁷ Once the KFTC imposes corrective measures, the parties who are allegedly aggrieved by the measures can file a private lawsuit in a court only after the KFTC finalizes its proceedings.¹⁸

III. THE KFTC DECISION HELD THAT MICROSOFT'S TYING PRACTICES VIOLATED THE MRFTA

In a decision published on February 2006, the KFTC fined Microsoft approximately thirty-one million dollars and required it to completely separate WMS from Windows.¹⁹ The KFTC also required Microsoft to provide two separate versions of Windows: one bundled with WMP plus WM and the other without those two programs.²⁰ It is noteworthy that the

⁹ *Id.*

¹⁰ *Id.* at 109.

¹¹ About KFTC, Korea Fair Trade Commission, <http://www.ftc.go.kr/eng> (last visited Oct. 27, 2006).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Jung & Chang, *supra* note 6, at 710.

¹⁹ *Microsoft Decision*, *supra* note 3, at 12.

²⁰ *Id.* at 3-4.

bundled version had to contain the “Media/Messenger Centre” that helps users download competing media players and instant messengers.²¹

A. *The KFTC Made Three Distinct Findings in its Microsoft Decision*

In its decision, the KFTC reviewed three issues concerning Microsoft’s illegal tying: 1) Microsoft’s practice of tying WMS to the Windows, 2) Microsoft’s tie-in of WMP to Windows, and 3) Microsoft’s practice of tying its instant messaging program, WM, to Windows.²² The KFTC found that Microsoft’s practice of tying these three products to the Windows operating system violated the MRFTA.²³

The KFTC made three findings on Microsoft’s violation of MRFTA in its decision. First, the KFTC found that Microsoft’s conduct “unreasonably interfere[d] with the business activities of other enterprisers.”²⁴ According to the decision, its tie-in practices forced other enterprisers of similar products to engage in trades and conduct that unfairly disadvantaged them.²⁵ Second, the KFTC found that Microsoft “considerably harm[ed] the interests of consumers.”²⁶ The KFTC supported this finding by noting that Microsoft 1) raised the entry barrier to the media server program market, restricting market competition and obstructing consumers’ welfare; 2) infringed upon consumers’ right to choose media server programs (here, referring to medial players and instant messengers); and 3) harmed consumers’ interests by reducing technology development arising from decreased competition.²⁷ Lastly, the KFTC found that Microsoft “unfairly coerce[d] or induc[ed] customers of competitors to deal with [it].”²⁸ The KFTC’s decision indicates that while Microsoft provided certain products to the counterpart enterprisers, it forced them to buy its other products too. Thus, Microsoft’s conduct was regarded as harmful to fair trade.²⁹

²¹ *Id.* at 5-6.

²² *See generally Microsoft Decision, supra* note 3.

²³ *Id.* at 76, 157, 226-27.

²⁴ *See Microsoft Decision, supra* note 3, at 76, 157, 226-27; MRFTA, *supra* note 7, at art. 3-2, § 1(1).

²⁵ *See Microsoft Decision, supra* note 3, at 76, 157, 226-27; MRFTA, *supra* note 7, at art. 3-2, § 1(3).

²⁶ *See Microsoft Decision, supra* note 3, at 76, 157, 226-27; MRFTA, *supra* note 7, at art. 3-2, § 1(5).

²⁷ *See Microsoft Decision, supra* note 3, at 76, 157, 226-27.

²⁸ *Id.*; MRFTA, *supra* note 7, at art. 23, § 1(3), art. 36, § 1(5).

²⁹ *Microsoft Decision, supra*, note 3 at 76, 157, 226-27.

B. *The KFTC Imposed Corrective Measures and Surcharges Against Microsoft*

After finding that Microsoft violated the MRFTA, the KFTC imposed fairly extensive penalties. Regarding the WMS, the KFTC ordered Microsoft to unbundle WMS from Windows Server Operating System within 180 days.³⁰ Concerning WMP and WM, Microsoft was required to provide two separate versions of Windows: one stripped of WMP/WM and the other with newly installed "Media/Messenger Centre" that will contain links to web-pages where users can download competing media players and instant messengers.³¹ For other versions of Windows already sold and currently in use by consumers, Microsoft was required to provide the "Media/Messenger Centre" through CDs or Internet updates.³² In addition to these corrective measures, the KFTC imposed a total of 32.49 billion won (approximately thirty-one million U.S. dollars) on both Microsoft Corporation and Microsoft Korea Ltd.³³

Microsoft's tie-in practices of WMS and WM had never undergone judicial examination prior to the KFTC's review.³⁴ On the other hand, Microsoft's tying practice on WMP was examined by the KFTC just one year after a similar case was decided by the European Commission ("E.C.") in 2004. A comparison of similar tying cases in the U.S. and the E.C. sheds light on the effectiveness of the KFTC's sanctions against Microsoft.

IV. THE UNITED STATES' AND THE EUROPEAN COMMISSION'S MICROSOFT CASES REVEAL THE INEFFECTIVENESS OF CERTAIN REMEDIES

There have been many similar antitrust claims across the world against Microsoft.³⁵ Although the scope of legal issues claimed against Microsoft varies depending on the jurisdiction, courts in the U.S. and Europe have commonly handled bundling issues relating to Windows. Yet, the remedies imposed by the U.S. and the E.C. have both proven to be ineffective for the harmed competitors of Microsoft as discussed below.

³⁰ Holding of *Microsoft Decision*, art. 1, § A (translated by this author following this analysis) [hereinafter "Holding"].

³¹ Holding at art. 2, §A; art. 2, § C(1).

³² *Id.* at art. 2, §D (1)-(3).

³³ *Id.* at art. 8, §A.

³⁴ 박정원 MS, [Park Jung-Won], 사건에 대한 공정위 시정조치의 내용과 의의 [*The Contents and Implication of the KFTC's remedy on the Microsoft Case*], 경쟁저널 [COMPETITION JOURNAL], Vol. 125, 47 (2006) (S.Korea) [hereinafter Park Jung-Won].

³⁵ See Picker *supra* note 1, at 197.

Such ineffectiveness was considered by the KFTC in designing its own measures.³⁶

A. *The U.S. Court's Settlement Decree on Antitrust Claims Against Microsoft Failed to Alleviate Competitors' Grievances*

In 2000, the U.S. District Court for the District of Columbia held that Microsoft violated Section 2 of the Sherman Act³⁷ by tying middleware products (including the Internet Explorer web-browser and WMP) to its own Windows Operating System.³⁸ The court ordered that Microsoft be split into two companies, one for selling operating systems and the other for program applications.³⁹ Upon appeal, the Court of Appeals for the District of Columbia remanded the issue of software packaging under Section 1 of the Sherman Act.⁴⁰ The appellate court indicated that the tying arrangement should be assessed under the "rule of reason" while the lower court held that the practice was *per se* illegal under Section 1 of the Sherman Act.⁴¹ On the other hand, the court affirmed the district court's ruling that Microsoft violated Section 2 of the Sherman Act by its illegal maintenance of a monopoly in the market for personal computer operating systems.⁴²

On remand, negotiations resumed between Microsoft and the Department of Justice ("DOJ"), and eventually led to a settlement agreement between Microsoft and the government on November 2001.⁴³ The DOJ agreed with all the essential parts of Microsoft's proposal.⁴⁴ With minor modifications, the district court entered the settlement decree as the final judgment.⁴⁵

The final judgment neither required separate packaging (unbundling) nor code removal from Windows.⁴⁶ However, the decree provided that

³⁶ Park Jung-Won, *supra* note 34, at 47.

³⁷ The Sherman Antitrust Act of 1890 § 2, Pub.L. 101-588, § 4(b), 104 Stat. 2880 (1999) (current version at 15 U.S.C. § 2 (2004)).

³⁸ U.S. v. Microsoft Corp., 97 F. Supp. 2d 59, 63-64 (D.D.C. 2000), *aff'd in part, rev'd in part*, 253 F.3d 34 (D.C. Cir. 2001).

³⁹ *Id.* at 63-65.

⁴⁰ *Microsoft*, 253 F.3d at 84.

⁴¹ *Microsoft*, 253 F.3d at 89-94 (The court indicated that it was not confident that bundling in computer software markets had sufficiently negligible "redeeming virtue" as to warrant *per se* treatment. Thus, on remand, the court directed the lower court to see whether the anticompetitive effects of the alleged tying practice outweighed Microsoft's claimed benefits.).

⁴² *Microsoft*, 253 F.3d at 46, 52-54.

⁴³ United States v. Microsoft Corp., 231 F. Supp. 2d 144, 150 (D.D.C. 2002).

⁴⁴ *Microsoft*, 253 F.3d at 63-65.

⁴⁵ *Id.* at 202-03.

⁴⁶ Proposed Final Judgment and Competitive Impact Statement; U.S. v. Microsoft Corp., 59 Fed. Reg. 42,845, 42855 (Aug. 19, 1994) (detailing the Proposed Final Judgment in U.S. v. Microsoft).

Microsoft's licenses with original equipment manufacturers ("OEMs") for Windows not restrict the OEMs' ability to install or display icons of non-Microsoft middleware.⁴⁷ The decree also allowed the OEMs to distribute, promote, and launch the non-Microsoft middleware programs.⁴⁸ Under such a remedy, the OEMs could sell computers without visible access, such as icons, to middleware (including WMP and Internet Explorer) and could make other media players the default installation.⁴⁹ However, it is notable that the underlying code for the middleware would continue to remain on the computers shipped and manufactured by the OEMs.⁵⁰

Because this federal case was settled without judgment under the standard required by the appellate court ("the rule of reason"), the consent decree is not subject to the established remedial rule⁵¹ of antitrust laws. However, based on the fact that the appellate court did recognize the harms caused by the tying practice in the browser market, the effectiveness of the adopted decree can be evaluated by considering whether it cured the recognized harms.

By making it possible for computer sellers to reduce the visibility of software functions such as Internet Explorer, the settlement decree enhanced the ability of browser competitors to install their software on the desktop. However, the decree however, does not effectively alleviate the problems relating to Microsoft's tying practice. First, as critics pointed out, because the decree allowed commingling Internet Explorer computer codes with those of Windows, other competing products, such as Netscape Navigator, barely survived.⁵² OEMs had "little incentive to install competing browsers", and "developers would have no incentive to write software" that

⁴⁷ Sue Ann Mota, *Hide It or Unbundle It: a Comparison of The Antitrust Investigations Against Microsoft in the U.S. and the E.U.*, 3 PIERCE L. REV. 183, 189 (2005). See also Wikipedia.com, Middleware, http://en.wikipedia.org/wiki/Middleware#_note-0 (last visited Jan. 10, 2007) ("Middleware is computer software that connects software components or applications. It is used most often to support complex, distributed applications. It includes web servers, application servers, content management systems, and similar tools that support application development and delivery. Middleware is especially integral to modern information technology based on XML, SOAP, Web services, and service-oriented architecture.").

⁴⁸ Sue Ann Mota, *supra* note 47, at 189 (citing *N.Y. v. Microsoft Corp.*, 244 F.Supp. 2d at 184).

⁴⁹ See *Microsoft Corp.*, 231 F. Supp. 2d at 177 (D.D.C. 2002).

⁵⁰ See Commission Decision, ¶ 798 ("In particular, the U.S. Judgment does not provide for removal of WMP code from the PC operating system."); ¶ 828 ("Removal of end-users access does not restore the choice of Microsoft's customers as to whether to acquire Windows without WMP.").

⁵¹ *New York v. Microsoft Corporation*, 224 F.Supp.2d 76, 96 (The remedial principle in the U.S. is quite straightforward: the remedy should "unfetter a market from anticompetitive conduct," "terminate the illegal monopoly," "deny to the defendant the fruits of its statutory violation, and ensure that there remain no practices likely to result in monopolization in the future.").

⁵² Mark Wigfield, *Appeals Court Judges Differ on Microsoft Antitrust Issue*, DOW JONES BUSINESS NEWS, Nov. 4, 2003.

was compatible with competing products because Microsoft had integrated “more features into Windows.”⁵³ Indeed, after the conclusion of the lawsuit, Microsoft gained a monopoly share of the market for web browsers—which it did not have at the time of the trial.⁵⁴

A remedy that merely requires that icons be hidden but leaves the intermingled source codes intact is not meaningful to other competitors. The E.C. seemed to understand that a fundamental problem was caused by the remaining software codes. In response, the E.C. required that Microsoft produce an additional version of Windows from which such codes were completely removed. Despite this additional measure, the E.C.’s imposed penalties did not fully correct the problem caused by Microsoft’s distribution advantage in the software market.

B. The E.C.’s Mandatory Versioning Was Not an Effective Remedy to Correct Wrongs Caused by Microsoft’s Tying Practices

The E.C. found that Microsoft abused its dominant position in the personal computer operating system industry in violation of Article 82 of the European Commission Treaty.⁵⁵ Sun Microsystems, one of Microsoft’s competitors in the server software markets, originally filed the complaint at the end of 1998.⁵⁶ The complaint focused on Microsoft’s refusal to supply information needed for interoperability with Windows.⁵⁷ Also, the E.C. began, on its own initiative, an investigation focusing on Microsoft’s tying practice of WMP into Windows.⁵⁸ On March 24, 2004, the E.C. rendered its decision with corrective measures and fines.⁵⁹ In the decision, the E.C. ordered Microsoft to disclose information that it refused to supply and allow its use for the development of compatible products.⁶⁰ Also, regarding tying practices, the decision required Microsoft to provide a version of Windows that does not include WMP.⁶¹ Thus, OEMs and consumers are left with the

⁵³ Jube Shiver Jr., *Microsoft Settlement Is Questioned; Appeals Court Judges Express Concern About The Lack Of Competition Two Years After Antitrust Pact Was Struck*, L.A. TIMES, Nov. 5, 2003 (quoting Judge Kuney’s statement).

⁵⁴ The EC Decision Against Microsoft: Windows on the World, Glass Houses, or Through the Looking Glass?, THE ANTITRUST SOURCE, Sept. 2004, at 10, available at <http://www.abanet.org/antitrust/source/09-04/Sep04MSBB.pdf> [hereinafter “Windows on the World”].

⁵⁵ Commission Decision, art. 3 at 299 (“For the infringement referred to in Article 2, a fine of EUR 497,196,304 is imposed on Microsoft Corporation.”).

⁵⁶ *Id.* ¶ 3.

⁵⁷ *Id.*

⁵⁸ *Id.* ¶ 5.

⁵⁹ *Id.* at art. 2.

⁶⁰ *Id.* at art. 5.

⁶¹ *Id.* at art. 6.

choice between “the bundled version” of Windows and the “unbundled version” of Windows.⁶² It should be noted that “the E.C. did not prevent Microsoft from offering” Windows bundled with WMP, although the decision asserted that “Microsoft must not circumvent the decision by engaging in technical or economic tying.”⁶³

There is no doubt that such “mandatory versioning”⁶⁴ is a stronger remedy than the mere icon-hiding of the U.S. settlement decree. However, it is unclear whether the E.C. remedy is truly strong enough to be effective in achieving its purpose. For example, OEMs will not be given sufficient incentive to purchase an unbundled version of Windows if it is priced identically to, but not lower than, the bundled version.⁶⁵ Indeed, Microsoft said that it will sell the stripped-down Windows version (known as “Home Edition N”) for the same price as its normal program.⁶⁶ Subsequently, Dell Incorporated and Hewlett-Packard Company, two of the world’s biggest personal-computer manufacturers, expressed their displeasure with the E.C.’s order.⁶⁷ Specifically, Dell said it did not plan to offer customers the version of Windows that does not include WMP.⁶⁸ Similarly, Hewlett-Packard Company stated that it expected minimal demand for the “N version” despite its availability to consumers.⁶⁹

Moreover, under the E.C. remedy, Microsoft is allowed to negotiate with OEMs to have the bundled version installed on desktops.⁷⁰ Under these circumstances, other media players suffer relative disadvantage in distributing their products because of the ubiquity of Windows.⁷¹ With WMP already installed on the system, an OEM will focus on the incremental costs of adding a second media player.⁷² Indeed, such incremental costs, which consist mostly of additional technical support and training costs, were used by Microsoft as a barrier to entry against Netscape Navigator in the U.S web-browser market.⁷³ In this way, other media player companies must negotiate with the OEMs to install their products in the bundled version of

⁶² *Id.*

⁶³ Oliver Sitar, *The EU Microsoft Decision: Preserving Interoperability and Free Choice in Software Markets*, MR-INT, 2004 (vol 1), at 5.

⁶⁴ Picker, *supra* note 1, at 203.

⁶⁵ Windows on the World, *supra* note 54, at 10.

⁶⁶ Josh Brown, *EU's Microsoft Order Has Skeptics— Stripped-Down Windows Won't Be Offered by Dell; H-P Sees Little Demand*, THE WALL ST. J., Apr. 1, 2005.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Picker, *supra* note 1, at 203-04.

⁷¹ *Id.* at 203-05.

⁷² *Id.* at 204.

⁷³ *Id.*

Windows.⁷⁴ Such a deal increases the distribution payment of those companies and worsens the under-distribution of other media players.⁷⁵ Therefore, the E.C.'s mandatory versioning is not practically effective to eradicate the harms to Microsoft's competitors caused by Microsoft's illegal tying practices.

V. THE KFTC'S CURRENT REMEDY IS THE SECOND-BEST POLICY

In its decision against Microsoft, the KFTC followed a remedy similar to the E.C.'s mandatory versioning by requiring Microsoft to separately produce another version of Windows from which the codes of WMP and WM are completely removed. Also, it required Microsoft to create a supplemental program in the bundled version to help end-users download other competing products. Compared to the remedies adopted by other courts, this measure seems to be a more effective approach to remedy the violation and promote fair competition. The KFTC's measure, however, is still unlikely to completely eradicate the wrongs of Microsoft's tying practices.

A. *The KFTC's Remedy Makes Remarkable Progress, but is Still Imperfect*

As briefly mentioned, the KFTC's remedy is distinguishable from other decisions announced by the U.S. and E.C. In regard to WMS, the KFTC took a different direction than the E.C.'s mandatory versioning or the icon-hiding remedy of the U.S. cases. The KFTC clearly ordered that Microsoft unbundle WMS from Windows.⁷⁶ While the U.S. decision only required hiding the icons of the programs, the KFTC ordered Microsoft to completely remove WMS' codes from Windows.⁷⁷ Moreover, under the KFTC's decision, Microsoft cannot provide WMS with any version of Windows.⁷⁸ For example, the KFTC strictly ordered that Microsoft not distribute WMS in any other form, including as separate CD ROMs, updates, download links or advertisements on Windows Operating System

⁷⁴ Of course, the competing products may not be installed to the unbundled version without Microsoft's products.

⁷⁵ Picker, *supra* note 1, at 205.

⁷⁶ Holding, art. 1, § A.

⁷⁷ Holding, art. 1, § A(1) ("The Commission will determine the range of source codes and files which shall not be included so as to unbundle WMS from the Windows Server Operating System, within 60 days of the date of this order, taking into account the examinees' opinions.").

⁷⁸ *Id.* at § B ("After 180 days of this order, the examinees shall sell and distribute WMS in a way separate from Windows Sever Operating System . . .").

package.⁷⁹ Such a complete separation is a stronger measure than the E.C.'s mandatory versioning and is also the simplest way to root out the problems of illegal tying.⁸⁰

As to the WMP and WM, however, the KFTC adopted a remedy similar to the E.C.'s mandatory versioning. The KFTC ordered that Microsoft "shall not tie Windows Media Player . . . and Messenger . . . to the Windows Personal Computer . . . Operating System However, apart from foregoing remedies . . . [Microsoft] may provide WMP and . . . Messenger tied to PC Operating System as currently provided."⁸¹ More importantly, echoing the E.C.'s decision, the KFTC did not require different pricing between the bundled and unbundled versions of Windows. Thus, just as in the E.C.'s decision, this remedy is not likely to give OEMs sufficient incentive to purchase an unbundled version. In other words, if the unbundled version is provided at the same price as (or at least not lower than) the bundled version, end-users and OEMs have little to no incentive to buy the unbundled version.

The KFTC advocates that its remedy is distinguishable from that of the E.C. because it requires separating WMP as well as WM.⁸² The KFTC argues that many companies will prefer the unbundled version without the instant messenger in order to enhance the company's network security and work efficiency.⁸³ Also, taking the potential defects of mandatory versioning into consideration, the KFTC required the bundled version to be equipped with a certain supplemental device. That is, the KFTC ordered Microsoft to "install and operate 'Media Player Centre' and 'Messenger Centre' in the 'bundled PC Operating System,'" ⁸⁴ through which Windows users can easily download other competing products. The KFTC explained that such a requirement guarantees equal opportunity for competitors as well as consumers to choose the product they want, even in the bundled version.⁸⁵ With regard to Microsoft's new Windows Operating System, Windows Vista, Microsoft was obligated to "provide devices . . . to readily download the

⁷⁹ *Id.* at § B(1)-(4).

⁸⁰ 정영진, MS [Youngjin Jung], 사건의 국제 경쟁법적 의의 [The Implication of Microsoft Case in International Competition Law], 경쟁저널 [COMPETITION JOURNAL], Vol. 125 at 63, Feb.-Mar. 2006 (S. Korea) (the title translated by this author) [hereinafter, Youngjin Jung].

⁸¹ Holding, Art. 2, § A.

⁸² Park Jung-Won, *supra* note 34, at 45.

⁸³ *Id.* at 47-48.

⁸⁴ See Holding, art. 2, § C(1). It is also interesting to note that the KFTC ordered Microsoft to provide service packs or updates which include those other competing products even to the users of existing Windows PC operating systems, apart from the bundled/unbundled versions provided. See Holding, art. 2, § D.

⁸⁵ Park Jung-Won, *supra* note 34, at 46.

streaming media players of other businesses which have their own formats when providing the ‘bundled [version].’”⁸⁶ Certainly, through those supplemental devices, other media players and messenger companies may be able to alleviate their disadvantage in distribution. Unlike the E.C.’s remedy, competitors can lower the additional costs for distribution since Microsoft’s bundled version will guide users to readily download those competitors’ software.

However, it is likely that even though “Media Player/Messenger Centre” will alleviate the under-distribution of other competing media players and instant messaging products, Microsoft will continue to occupy an advantageous position in distribution. When competing products are not installed on Windows by default, the significant portion of consumers who are already accustomed to the existing desktop environment organized with WMP and WM are unlikely to download other competing products.⁸⁷ As in the browser market, “most consumers become wedded to the first products to which they are exposed. . . .”⁸⁸ In other words, any forms of “first-sighting” are “important market movers.”⁸⁹ Therefore, the KFTC’s remedy with the “Media/Messenger Centre” remains an imperfect measure. As suggested below, the KFTC could have adopted better measures to curb Microsoft’s monopoly and restore fair competition: a “must-carry” remedy.

B. The KFTC Could Have Adopted a Must-Carry Measure

There was a wide range of remedies from which the KFTC could choose in deciding the Microsoft case. There are three remedial options which seem most applicable in this case: complete unbundling, mandatory versioning, and a must-carry remedy. Among the three options, the must-carry remedy is most likely to mitigate the disadvantage that Microsoft’s competitors face in distributing their software as discussed below.

1. Complete Unbundling

First, the KFTC could have adopted a narrow corrective measure to simply require that end-users or OEMs be free to remove access to WMP and WM while leaving the codes of those programs intact. The same remedy was already used in the U.S. to remedy Microsoft’s practice of

⁸⁶ Holding, art. 2, § C(2).

⁸⁷ Youngjin Jung, *supra* note 80, at 65.

⁸⁸ Charles A. James, *The Real Microsoft Case and Settlement*, 16 ANTITRUST 58, 59 (Fall, 2001).

⁸⁹ *Id.* at 60.

bundling Internet Explorer to Windows.⁹⁰ As discussed above, however, this measure has proven ineffective in alleviating the distribution disadvantage of other competing web browsers. With this option, a similar problem will occur in the market for media players. For example, Microsoft's distribution advantage⁹¹ incurred by the existence of the remaining software codes can give content providers and software developers a strong incentive to use media platforms based on WMP.⁹² Therefore, the remedy will be more effective if it requires Microsoft to remove the computer codes of the tied products from the operating system. The KFTC adopted this option to completely unbundle WMS from Windows Server Operating System.⁹³ However, such complete unbundling requires Microsoft to redesign its software products, the codes of which are tightly commingled with Windows. For this reason, the U.S. and E.C. were reluctant to apply this remedy to their cases.⁹⁴ The KFTC also seemed hesitant to take this intrusive redesigning measure on every issue involved.⁹⁵

2. *Mandatory Versioning*

Alternatively, the KFTC could mandate broader conduct relief. To restore the market to a pre-bundling competitive condition, "an additional affirmative remedy would be necessary to 'kick-start' the market into competition."⁹⁶ This type of remedy could include "fencing in" remedies such as a bundling prohibition under which Microsoft may be permitted to bundle WMP only if it also offers a practical unbundled alternative.⁹⁷ This

⁹⁰ See Sue Ann Mota *supra* note 47, at 189; see also *Microsoft Corp.*, 231 F. Supp. 2d at 177.

⁹¹ Even in consideration of internet downloads, the evidence in E.C.'s Microsoft case suggests that Microsoft still enjoys a powerful distributional advantage over its software competitors. In other words, "Microsoft can easily make software present by just folding new software into Windows." Picker, *supra* note 1, at 199; See also Commission Decision, ¶ 842.

⁹² Youngjin Jung, *supra* note 80, at 63. See also Picker, *supra* note 1, at 203-04.

⁹³ Holding, art. §1(A).

⁹⁴ In *New York v. Microsoft Corp.*, the court noted:

The case law is unwavering in the admonition that it is not a proper task for the Court to undertake to redesign products. 'Antitrust scholars have long recognized the undesirability of having courts oversee product design' Accordingly, even if Plaintiffs had presented evidence sufficient to support their request that the Court require Microsoft to remove code from its products, the Court would be appropriately reluctant to enter a remedy that requires Microsoft to completely redesign its Windows products and places the Court in the role of scrutinizing whether Microsoft has done so without degradation of the ultimate product.

224 F.Supp.2d 76, 158 (D.D.C., 2001) (internal citation omitted).

⁹⁵ Picker *supra* note 1, at 203.

⁹⁶ R. Craig Romaine & Steven C. Salop, *Slap Their Wrists? Tie Their Hands? Slice Them into Pieces? Alternative Remedies for Monopolization in the Microsoft Case*, 13 ANTITRUST ABA 15, 16-17 (1999).

⁹⁷ *Id.* at 15

broader conduct relief is found in the E.C.'s remedy of mandatory versioning. But, as already pointed out, without creating a price gap between the two versions, there is little incentive for the consumers to buy the unbundled version in the relevant market.⁹⁸ One might argue that such mandatory versioning could be improved by mandating a substantial price difference between the two versions. However, mandating such different pricing is not an easy task: it is difficult to calculate the market price of the tied products (here, WMP and WM) which are partly integrated into the operating system, and generally provided without charging additional fees to consumers.⁹⁹ Accordingly, if the KFTC had adopted this remedy, it would likely face the same problems that occurred in the E.C case.

3. *Must-Carry Remedy*

In order to avoid the problems of the potential remedies above, the KFTC could have adopted another available option. That is, a must-carry remedy, under which Microsoft would have to install one or more competing media players and messengers on the bundled version of Windows as the default. Even though some argue that the "Media/Messenger Centre" requirement has a similar function as the must-carry remedy, such a quasi must-carry remedy is not as effective as a pure must-carry option in giving end-users equal opportunities to use competing products.¹⁰⁰ Because competing products are already installed as default under the pure must-carry option, we can expect that the end-users will have natural chances to use those competing programs at first sight. Accordingly, the must-carry remedy would directly mitigate the current distribution advantage of Microsoft by placing competing products at the same starting point with WMP and WM.¹⁰¹ It would also lessen the market power that is exercised by OEMs in the deals that they strike to distribute software.¹⁰²

The core disadvantage of the must-carry option is the concern about the selection of products which will be loaded to the tying product.¹⁰³ This was the one reason that a similar remedy was rejected in the U.S. case.¹⁰⁴

⁹⁸ Brown, *supra* note 66.

⁹⁹ Youngjin Jung, *supra* note 80, at 64.

¹⁰⁰ See discussion, *infra* Part V.B.

¹⁰¹ Picker, *supra* note 1, at 205.

¹⁰² *Id.*

¹⁰³ *Id.*; see also Willard K. Tom, *Remedying the Irremediable: The Government's Dilemma in the Microsoft Case*, ANTITRUST SOURCE, Nov. 2001, at 2, available at <http://www.abanet.org/antitrust/source/11-01/dilemma.pdf>.

¹⁰⁴ See *Massachusetts v. Microsoft Corp.*, 373 F.3d 1199, 1239-40 (D.C. Cir. 2004) (quoting the statement from the Department of Justice to explain its decision not to pursue the States' proposed Java

But the KFTC could use an approval mechanism of the sort used in divestiture orders in the U.S.¹⁰⁵ In order to ensure that the strong competitors are carried and to limit the must-carry obligation to those competitors, the approving authority such as a court and the KFTC could rely on objective criteria such as market shares or the number of users.¹⁰⁶ Indeed, the KFTC already set forth specific standards to select the competing products that will be listed in the "Media/Messenger Centre." The decision specified the three categories of the standard: "the streaming media players from the . . . businesses possessing the basic technology, icons of messengers from businesses having more than five percent of market shares in net users per month" and "icons of 'Media Player Web Centre' and the 'Messenger Web Centre'".¹⁰⁷ Because such a definite standard was already established, the KFTC could apply it to launch a pure must-carry remedy. It would have been a better remedy for the KFTC to require Microsoft to install every entry at default that will be included in the "Media/Messenger Centre."

C. *The KFTC's Current "Media/Messenger Centre" Requirement Seems to be the Second-Best Alternative*

Although a pure must-carry remedy could be the most effective measure as suggested above, the KFTC's "Media/Messenger Centre" is the second-best measure available since the economic interests of concerned parties does not permit the pre-installation of competing products. In fact, every concerned party seemed reluctant to accept the pure must-carry measure. When designing the current remedy, the KFTC considered each party's costs and benefits involved in adopting the must-carry remedy.¹⁰⁸ In fact, the KFTC recognized that there would be some negative impacts on the related parties by pre-installing competing software codes in the bundled version of Windows.¹⁰⁹ For example, if Microsoft carries competing media players and instant messengers in its operating system, Microsoft will have

must-carry provision: "[I]t is not the proper role of the government to bless one competitor over others, or one potential middleware platform over others.").

¹⁰⁵ Willard K Tom, *supra* note 105, at 3.

¹⁰⁶ *Id.*

¹⁰⁷ Holding, art. 2, § C(2)(a). *See also* Holding, art. 2, § C(1)(c) ("The examinees shall connect the users to the said businesses or the Web Center's websites so that the users can download desired programs, when the users click on the icons of each program which appear following the clicks on Media/Messenger Centre, or when the users click on the icons of Media/Messenger Web Centre.").

¹⁰⁸ E-mail from 이병건 [Lee Byung-Geon], an administrative officer in charge of the *Microsoft* case in the KFTC, to the author (Nov. 20, 2006, 00:38:03 PST) (on file with the Journal).

¹⁰⁹ *Id.*

to bear responsibility for legal consequences arising from those pre-installed software.¹¹⁰ In other words, if the pre-installed software malfunctions or is involved in a legal complaint concerning copyrights or intellectual property rights, Microsoft would also be heavily obliged to fix such problems.¹¹¹ To clear up those potential legal problems, Microsoft and OEMs would have to thoroughly examine the source codes of the software that would be loaded to Windows. Such a rigorous inspection could be expected to burden both Microsoft and OEMs with high additional costs.¹¹² At this point, because the KFTC took into account such negative impacts on the OEMs, and not on Microsoft, it was reluctant to adopt the pure must-carry remedy.¹¹³

Moreover, Microsoft's competing software makers expressed concerns about exposing their software's source codes to Microsoft and other third parties through the process of inspections as described above.¹¹⁴ Also, they worried that if Microsoft was given discretionary power in designing the must-carry version of Windows, the pre-installed software could be arbitrarily modified.¹¹⁵

Computer manufacturers were also reluctant to follow the pure must-carry remedy.¹¹⁶ If they sell computers designed for the must-carry version of Windows, they will have to provide after-sale service on the pre-installed programs.¹¹⁷ Such additional after-sale service obligations would burden the manufacturers with incremental costs. Due to the highly competitive nature of computer markets, such increased costs would in turn significantly compromise the manufacturers' profit margins. Therefore, even though a pure must-carry option provides consumers with full equal opportunities to use competing products, the KFTC decided not to impose such a remedy on Microsoft.¹¹⁸

Yet the KFTC explained that although the pure must-carry remedy is excluded, the "Media/Messenger Centre" will have a very similar effect as the must-carry alternative.¹¹⁹ Because of the ubiquitous high-speed internet connections in Korea,¹²⁰ such link icons on the screen are likely to give

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* See also another e-mail from Lee Byung-Geon (Feb. 6, 2007, 06:05:25 PST) (on file with the Journal).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Don Kirk, *Technology; In Korea, Broadband Is Part of the Culture*, N.Y. TIMES, Oct. 29, 2001, C3.

Windows users a similar impression and recognition like those of pre-installed software.¹²¹

In sum, among the various remedial options available, the must-carry requirement against Microsoft would be the most effective way to give Windows users fully equal access to the competing products. But as discussed above, practical difficulties exist in providing equal accessibility through requiring pre-installation of the competing software. Thus, the "Media/Messenger Center," which is expected to create similar (but still not equal) accessibility as the must-carry obligation, is an appropriate alternative as the next best option for the KFTC.

VI. CONCLUSION

Because the remedy phase of an antitrust case is crucial,¹²² it is worthwhile to evaluate the effectiveness of the remedy adopted after the finding of antitrust violations. In the U.S., the function of the remedy (in civil cases) is to "restore the market to the condition it would have enjoyed had there been no violation, and to deter future violation."¹²³ Such a remedial purpose seems consistent with that of Korea and Europe, because the competition laws of those countries share a similar underlying goal: the protection of fair market competition.¹²⁴

Microsoft's tying practices in relation to its operating systems and applications have been condemned as a violation of antitrust laws in various parts of the world. While courts have ordered diverse remedies against Microsoft, such measures have not effectively eliminated the unfair competitive advantage that Microsoft enjoys. The D.C. District Court's settlement measure requiring hiding icons without code removal was not a meaningful measure to mitigate the distribution disadvantage of Microsoft's competitors. On the other hand, while the E.C.'s mandatory versioning was a more effective remedy than that of the U.S., it is still defective due to the lack of different pricing between the bundled and unbundled versions. In this regard, the KFTC's idea of "Media/Messenger Centre" is the most effective remedy so far because it lessens Microsoft's relative advantage in distribution obtained by bundling its application programs with Windows.

¹²¹ *Id.*

¹²² ELEANOR M. FOX ET AL., U.S. ANTITRUST IN GLOBAL CONTEXT, 186 (2nd ed. 2004).

¹²³ *Id.*

¹²⁴ Youngjin Jung, *supra* note 80, at 69; See also Per Jebsen & Robert Stevens, *Assumptions, Goals and Dominant Undertakings: The Regulation of Competition Under Article 86 of the European Union*, 64 ANTITRUST L.J. 443, 443 (1996).

One might argue that the KFTC's remedy is still unsatisfactory relief to harmed competitors because it does not require Microsoft to pre-install the competing products by default. In other words, the KFTC could impose a must-carry obligation on Microsoft because such an obligation could neutralize Microsoft's ability to tie WMP and WM to Windows. However, such a pure must-carry obligation may not have been able to survive the potential legal and economic problems that would arise when the competing software gets commingled with the codes of Windows. Therefore, the KFTC's "Media/Messenger Centre" holding appears to be the second-best alternative to remedy Microsoft's anticompetitive violations while preserving as many aspects of the pure must-carry remedy as possible.

TRANSLATION

KOREA FAIR TRADE COMMISSION

PLENARY SESSION

Decision of 2006-046

February 24, 2006

Case No.: 2002 Kyung-Chok 0453, 2005 Kyung-Chok 0375
Case Name: *In the Matter of* the Abuse of Market Dominant Position of Microsoft Corporation and Microsoft Korea
Examinees: 1. Steve Ballmer, Chief Executive Officer, Microsoft Corporation, One Microsoft Way, Redmond, WA 98052, United States
2. Yu Jae-Sung, Chief Executive Officer, Microsoft Korea, 6th floor, Posco Center, 892 Daechi-dong, Gangnam-gu, Seoul.

Legal representative of Examinees: Kim & Chang
Attorneys in charge: Jung Kyung-Taek, Ahn Jae-Hong, Rim Yong

HOLDING¹²⁵

1. TYING WINDOWS MEDIA SERVICE

A. Within 180 days of the notification date of this cease and desist order (hereinafter referred to as “date of this order”), the examinees shall not tie Windows Media Service (hereinafter referred to as “WMS”, including all the programs that perform the same or equivalent functions; hereinafter

¹²⁵ Translators' Note: The translation for this article only includes the "Jumun" ("주문") part of the whole opinion. *Microsoft Decision, supra*, note 3 at 1. In general, the "Jumun" means the text of a judicial decision which briefly summarizes a legal determination and the remedies imposed in a case. In this case, however, the "Jumun" only contains the remedies imposed against the examinee Microsoft. Here, I translated the "Jumun" as "holding" in English, taking into consideration the characteristics and purpose of the full opinion.

the same shall apply) to the Windows Server Operating System (including Windows Server Operating System, regardless of the names, which examinees will develop and sell from now on, Windows Server 2003 and all the other older versions).

(1) The Commission will determine the range of source codes and files which shall not be included so as to unbundle WMS from the Windows Server Operating System, within 60 days of the date of this order, taking into account the examinees' opinions.

(2) The examinees shall submit a list of the source codes of each version and a detailed report of each file which cannot be included in accordance with subsection (1) above in the Windows Server Operating Systems that will be developed from now on, within 60 days before the commencement of sale.

B. After 180 days of this order, the examinees shall sell and distribute WMS in a way separate from Windows Sever Operating System, and shall not perform any acts that might harm the separate sale and distribution of WMS. Any of the following shall be prohibited:

(1) The act of providing Windows Server Operating System packages which include a compact disk (hereinafter, referred to as "CD") that includes WMS or equivalent programs; or providing the service packs or updates, which include WMS, of the Windows Server Operating System.

(2) The act of providing WMS download link on Windows Server Operating System, the subsequent service packs or the updates.

(3) The act of having display or advertisement that induces, or might induce, installation or use of WMS in Windows Server Operating System, the subsequent service packs or the updates.

(4) The act of setting up WMS as a default installation not through the direct decision of users (including consumers, manufacturers and distributors; hereinafter the same shall apply),

C. The examinees shall assure that the performance and stability of the Windows Server Operating System which follows the measures of section

A is not inferior to the version which does not follow the measures; and that, when the source codes and files excluded under the measures of section A get installed to the Windows Server Operating System, the System shall perform as if it has originally built-in such codes and files.

D. In relationship with server manufacturers, the examinees shall not perform any of the following:

(1) The act of trading on the conditions of providing, distributing, renting, promoting, using, installing or supporting only WMS; the act of providing economic or non-economic benefits such as payment in return of such conditions, reducing the price of Windows Server Operating System and creating favorable terms and conditions of businesses.

(2) The act of retaliation, or giving notice of retaliation, regardless of its forms thereof, such as reducing or suspending the offer of economic or non-economic benefits for the reason that the server manufacturers attempt to provide, distribute, rent, promote, use, install or support other software which is competing with WMS.

2. TYING WINDOWS MEDIA PLAYER AND MESSENGER

A. After 180 days of the date of this order, the examinees shall not tie Windows Media Player (hereinafter referred to as "WMP"; including its successors and all of the examinees' programs, regardless of their names, which perform the same or equivalent functions of WMP) and Messenger (Windows Messenger, MSN Messenger and all of the examinees' programs, regardless of their names, which perform the same or equivalent functions; hereinafter referred to as "the examinees' Messenger") to the Windows Personal Computer (hereinafter referred to as "PC") Operating System (including Windows XP, Windows Vista, other older versions and every Windows PC Operating System, regardless of its name, which examinees will develop and sell from now on; herein after the same shall apply): hereinafter, referred to as "unbundled PC Operating System." However, apart from the foregoing remedies, if the examinees follow the measures specified in section C below in regard to the competing products, they may provide WMP and the examinees' Messenger tied to the PC Operating System as currently provided (hereinafter, referred to as "bundled PC Operating System") in addition to

the “unbundled PC Operating System.” Regarding the examinees’ certain versions of the Operating System deemed to have had substantially low market shares of less than 5 percent at the end of previous year, the Commission may withdraw all or part of this order upon the examinees’ request after the date of this order, taking into account the degree of competition restoration, the burden of examinees and their expected position in the future market.

(1) As to “the unbundled PC Operating System,” the methods and procedures set forth under section B below apply.

(2) As to the “bundled PC Operating system,” the methods and procedures set forth under section C below apply.

B. The examinees shall be subject to the following when providing “unbundled PC Operating System.”

(1) In order to provide “unbundled PC Operating System,” the examinees are obliged to unbundle WMP and the examinees’ Messenger from the existing Windows PC Operating System.

(a) The Commission will determine the range of source codes and files which shall not be included so as to unbundle WMP and the examinees’ Messenger from Windows PC Operating System, within 60 days of the date of this order, taking into account the examinees’ opinions.

(b) The examinees shall submit a list of the source codes of each version and a detailed report of each file which cannot be included under subsection (1) above, within 60 days before the commencement of sale.

(2) After 180 days of this order, the examinees shall sell and distribute WMP and the examinees’ Messenger in a way that is separate from the “unbundled PC Operating System,” and shall not perform acts that might harm the separate sale and distribution of WMP and the examinees’ Messenger. Any of the following shall be prohibited:

(a) The act of providing the “unbundled PC Operating System” packages which include a CD that includes WMP or the examinees’

Messenger or equivalent programs; or providing the service packs or updates, which include WMP or the examinees' Messenger, of the "unbundled PC Operating System."

(b) The act of providing a download link for WMP and the examinees' Messenger in the "unbundled PC Operating System" or its service packs or updates.

(c) The act of having display or advertisement that induces, or might induce, installation or use of WMP or the examinees' Messenger in the "unbundled PC Operating System," its service packs or updates.

(d) The act of setting up as a default installation, WMP, digital audio or video format which the examinees possess, Digital Rights Management (hereinafter referred to as "DRM"), codec, the examinees' Messenger or communication protocols for the use of the Messenger in the "unbundled PC Operating System," its service packs or updates, not through the direct decision of users.

(3) The examinees shall assure that the performance and stability of the "unbundled PC Operating System" which follows the measures of subsection (1) above is not inferior to the version which does not follow the measures; and that, even when the source codes and files excluded under the measures of subsection (1) above get installed to the "unbundled PC Operating System," the System shall perform as if it has originally built-in such codes and files.

C. The examinees shall be subject to the following when providing "bundled PC Operating System":

(1) Examinees shall install and operate "Media Player Centre" and "Messenger Centre" (hereinafter referred to as "Media/Messenger Center" when indicating both) in the "bundled PC Operating System" according to each of the following; and the Media/Messenger Centre shall provide users with substantial opportunities to download competing products as required below.

(a) The icons and menus of Media/Messenger Centre shall be placed where users can readily recognize, for example, the program menu list or the desktop of the "bundled PC Operating System"; they shall

maintain the same or similar sizes and forms as those of corresponding menus or icons (hereinafter referred to as “icons”) of WMP and Windows Messenger.

(b) The Media/Messenger Centre, when users click on its icons, shall include, among the streaming media players or instant messengers (hereinafter, referred to as “messengers”) provided in this country, the streaming media players from the Commission-recognized businesses possessing the original technology;¹²⁶ and icons from businesses having more than 5 percent of market shares in net users per month as reported by the Commission-recognized market research groups as of the date of this order; and icons of “Media Player Web Centre” and the “Messenger Web Centre” (hereinafter, referred to as “Media/Messenger Web Centre” when indicating both) of the said businesses.

(c) The examinees shall connect the users to the said businesses or the Web Centre’s websites so that the users can download desired programs, when the users click on the icons of each program which appear following the clicks on Media/Messenger Centre, or when the users click on the icons of Media/Messenger Web Centre.

(d) When the businesses providing streaming media players or messengers do not want to have their products included in the Media/Messenger Centre, or the businesses demand substantially unfair conditions such as requesting the payment in return or waiving the responsibility of a surety, the examinees may request the Commission to exclude the products from the Media/Messenger Centre. In that case, the Commission may remove from the Media/Messenger Centre even the products which are subject to C(1)(b) of this section.

(e) After 1 year of this order, the Commission, upon the interested parties’ request, may change the list of the media players and messengers which shall be included in the “Media/Messenger Centre,” taking into account the fluctuations of the market conditions.

¹²⁶ The “original technology” is the term translated from “Won Cheon Gi Sul (원천기술).” *Microsoft Decision, supra*, note 3 at 6 (“Won Cheon Gi Sul” is the term representing a technology which is regarded to be original and first, without rivals. Sometimes, a patent acquisition determines whether one has the original technology.).

(f) Within 60 days of this order, the Commission shall determine the range of streaming media players and messengers of which icons are placed in the Media/Messenger Centre as well as the details of the registration process and the operation of the Centre.

(2) As to Windows Vista (including every Windows PC Operating System and its older versions which are sold as successors to Windows XP, regardless of their names; hereinafter the same shall apply), the examinees shall provide devices as follows for users to readily download the streaming media players of other businesses which have their own formats, when providing the “bundled PC Operation System.”

(a) The examinees shall allow other Commission-recognized businesses possessing basic technology to register their own formats in accordance with the reasonable conditions set by the examinees upon the Commission's approval. If there is concern for disclosing the source codes or other trade secrets of the businesses due to the registration of their formats, the Commission shall determine the measures to resolve the concern taking into account those businesses' opinions.

(b) When users want to play the Internet streaming contents or the contents saved in the users' hard-disk or CD ROM written in different formats, and when the software that can play such contents is not registered in the Windows PC Operating System, the examinees shall connect the users to those media player businesses so as to download the software needed to play those contents.

(c) Within 90 days of the date of this order or the date of launching Windows Vista's beta version, whichever is later, the examinees shall disclose on the Internet a detailed document describing the instructions and the contents of the devices which the examinees will provide.

(3) From the point when the examinees are commercially and technically able to begin mutual communication with other messenger businesses under reasonable terms and conditions, the examinees shall make good faith efforts to create an agreement (hereinafter, referred to

as “mutual compatibility agreement”) on which domestic MSN users can mutually communicate with the users of other messengers.

(a) Within 120 days of this order, so as to make a mutual compatibility agreement, the examinees shall begin to consult with messenger businesses possessing more than 5 percent of market shares in net users per month as reported by the Commission-recognized market research groups as of the date of this order. However, the examinees may not consult with those who manifest intent not to make the mutual compatibility agreement.

(b) Every 6 months after the beginning of consultation for the mutual compatibility agreement, the examinees shall report to the Commission the progress of the consultation.

(4) The examinees shall assure that the performance and stability of the “bundled PC Operating System” which follows the measures of subsection (1) or (3) is not inferior to the version which does not follow the measures.

D. Within 180 days of this order, the examinees themselves, or through a third party, shall provide the users of the existing Windows PC Operating System, which is not subject to Section A or B above, with service packs which include products competing with WMP or the examinees’ messengers; and shall provide, through Windows updates (including updates for Windows PC Operating System, WMP and Windows messengers), the Media/Messenger Centre as set forth in C(1) above.

(1) When the service packs are distributed in a form of CD, the programs which will be included in the CD shall be determined in accordance with C(1)(b) above.

(2) Taking into account the examinees’ opinions, the Commission shall determine the details as to the enforcement of this order such as the range of supports and surety responsibilities of each business which manufactures the said CD and provides the programs in the CD.

(3) As to the updates in accordance with the subsection (1) above, the examinees shall announce the fact that they distribute the CDs at their own expense and that any users who want the CDs may apply for them;

and shall provide the CDs to the applicants for free within 1 year of this order.

E. The examinees shall not tie WMP or the examinees' Messenger to the examinees' other products which have more than 50 percent of national market shares in sales as of the date of this order, such as Microsoft Office, Microsoft Word, Microsoft PowerPoint and Microsoft Excel; and shall not perform other conduct which corresponds to such tying. The specific ranges of the examinees' other products shall be determined by the Commission within 90 days of this order.¹²⁷

F. Via the Microsoft Developer Network (hereinafter, referred to as "MSDN"), the examinees shall provide PC manufacturers (including distributors; hereinafter, the same shall apply), related hardware businesses (meaning independent hardware businesses which develop PCs bundled with Windows PC Operating System or the hardware which is included or used with server computers that carry server operating systems within the country; hereinafter, the same shall apply), software developers (meaning businesses other than the examinees which develop or sell software products within the country; hereinafter, the same shall apply), the Internet service providers (meaning businesses which provide the Internet connection services to the domestic consumers, whether or not they possess their own contents; hereinafter, the same shall apply) and the Internet contents businesses (meaning domestic businesses which provide contents to the Internet users within the country by running websites; hereinafter, the same shall apply) with the following: the Application Programming Interfaces (meaning interfaces [including related callback interfaces] which WMP and Windows messengers make calls to so as to be given services from the Windows PC Operating System; hereinafter, referred to as "API"), which WMP and Windows messengers use in order to interconnect and operate themselves with the Windows PC Operating System, and related documents (meaning all the information about identification and direction of APIs which is necessary for those who have common knowledge on the related field to effectively use the APIs) for the purpose of such interconnection and operation. The APIs and the related documents shall be as accurate and specific as the APIs which are ordinarily made public in MSDN by the examinees; and

¹²⁷ This section has been withdrawn as a result of Microsoft's appeal brought to the Commission. On June 16, 2006, the Commission published a ruling which specified that withdrawal. *In the Matter of the Appeal from Microsoft Corporation and Microsoft Korea*, *supra* note 4 at 1.

shall be so prepared that users who have ordinary knowledge and capability regarding the industry have no difficulty in using them. The information made public pursuant to this order shall be released until the final beta release of each product if the new main versions of WMP and Windows messengers are launched; either until more than 150,000 copies of beta versions are distributed or until the same number of copies are provided to the paid MSDN users, if the new version of Windows PC Operating System is launched.

G. In relationship with PC manufacturers, software developers, hardware businesses, the Internet service providers or the Internet contents businesses (hereinafter, all referred to as “PC manufacturers”), the examinees shall not perform any of the following:

(1) The PC manufacturers’ acts of trading on the conditions of providing, distributing, renting, promoting, using, installing or supporting only WMP, the examinees’ media formats, DRM, codec, the examinees’ messengers (hereinafter, all referred to as “WMP and the like”); or their acts of providing economic or non-economic benefits such as payment in return of such conditions, reducing the price of the Windows PC Operating System, creating favorable terms and conditions of businesses.

(2) The examinees’ acts of retaliation, or giving notice of retaliation, regardless of its forms thereof, such as reducing or suspending the offer of economic or non-economic benefits for the reason that the PC manufacturers attempt to provide, distribute, rent, promote, use, install or support other software which is competing with WMP and the like.

3. THE SCOPE OF APPLICATION OF THIS ORDER AS TO TIME AND TERRITORY

A. This order shall apply to all of the Windows Server Operating Systems and Windows PC Operating Systems which the examinees provide in Korea. However, even if those products are provided within the country, this order shall not apply if it is evident that they will be exported to other countries.

B. This order shall remain in force for 10 years after the date of this order. However, the examinees may annually request the Commission to review

this order after 5 years of the date of this order.

(1) The Commission, upon the examinees' request, may review the change of the market conditions, the status of competition and the like; and if a substantial improvement of the competition in the relevant market is recognized in the review as a result of the effective enforcement of this order, the Commission may withdraw or change all or part of this order.

(2) The effect of a withdrawal or change under subsection (1) above does not affect the examinees' conduct performed prior to the withdrawal or change.

4. As to the enforcement of this order, the Commission shall determine the details to which this order does not specify within 120 days of the date of this order, taking into account the examinees' opinions.

5. To determine specific technical measures necessary to enforce this order and ensure effective compliance with the order, the Commission may appoint a "Supervisory Board." The Board's organization and the scope of its duties shall be determined by the Commission.

6. The Commission, upon the examinees' request, may change the period of compliance if there is a reasonable ground.

7. When the Commission forms the measures taking into account the examinees' opinions, they must cooperate with the Commission in good faith; if the examinees do not cooperate or submit false materials in violation of the principle of good faith, the Commission may waive the process of opinion collection set forth in this order.

8. The examinees must pay to the National Treasury the surcharges specified under each of the following.

A. Amount of Payment: a total of 32.49 billion won (27.23 billion won from Microsoft Corporation and 5 billion won from Microsoft Korea).

(1) For Tying WMS

(a) Examinee Microsoft Corporation: 626 million won

(b) Examinee Microsoft Korea: 1.667 billion won

(2) For Tying WMP and the examinees' messengers

(a) Examinee Microsoft Corporation: 26.604 billion won

(b) Examinee Microsoft Korea: 3.593 billion won

B. Payment Due: Within the period (60 days) specified in the payment notice.

C. Place to Pay: The Bank of Korea National Treasury Receipt Agency or a post office.